# MALAYAN UNION REPORTS.

## TAY AH LIANG v. ASSISTANT FOOD CONTROLLER, JOHORE.

[Orig. Civil Jurisdiction (Laville, J.) June 12, 1946]

*Food Control Proclamation (No. 10), Paragraph 12 (2) — Power to revoke any licence without any reason assigned — Duty to act judicially — Indemnity and Validating Ordinance 1946, Section 3 (1) — Bar to legal proceedings against persons acting in good faith for acts done in the execution of their duty. — Civil Jurisdiction of the High Court of the Malayan Union.*

By the Food Control Proclamation (No. 10), Paragraph 12 (1), power is conferred on a Deputy Food Controller to issue licences for wholesale dealing in any controlled article and by paragraph 12 (2) the same officer may at any time "without any reason assigned" revoke any such licence.

Licences were issued to the applicant in January, 1946, to deal by wholesale in flour and rice respectively. By a notice in writing dated 20th May, 1946, the Assistant Food Controller, Johore, notified the applicant that the said wholesale licences were cancelled. No prior communication with the applicant as to the basis on which the Deputy Food Controller was proceeding, had been made to the applicant, who was given no opportunity to contradict, vary or amplify any information which the Deputy Food Controller had been given or obtained and which presumably he considered justified him in taking the action complained of. It having been pointed out to the Deputy Food Controller that his action in revoking the licences was a judicial act and that he had failed to act judicially in the matter, a request was made to him to restore the licences and to give the applicant an opportunity of contradicting, varying or amplifying any facts which the Deputy Food Controller considered relevant to the question, but this application of the applicant (who had said that failing a restoration of his licences and the matter being judicially dealt with, he would apply for a certiorari) was refused and he was informed that he was at liberty to apply to Court. Accordingly the applicant applied for an order (having the like effect of a writ of certiorari issued by the High Court of Justice in England) to remove the said decision into the High Court to be quashed. Upon the application for an order nisi,

**Held**, (1) That the provision in paragraph 12 (2) of the Food Control Proclamation (No. 10) giving power to cancel licences without any reason assigned, conferred a power which must be exercised judicially and that on the correspondence it was manifest that the Deputy Food Controller, Johore Bahru, in this matter had not acted judicially and that if the court had jurisdiction the order nisi would have been granted, but

(2) That by reason of the provisions of Gazette Notifications 11 and 223 of 1946 the court had no jurisdiction at present, as the matter was a civil one and that in any event

(3) The Deputy Food Controller was protected by Section 3 (1) (a) of the INDEMNITY and VALIDATING ORDINANCE 1946, so that the application was dismissed.

*Cases referred to :—*

(1) *Frome United Breweries Co. v. Bath Justices* (1926) A.C. 586.

(2) *Reg. v. London County Council, ex parte Akkersdyk* (1892) 1 Q.B. 190.

(3) *Local Government Board v. Arlidge* (1915) A.C. 120.

(4) *Duke of Sutherland v. British Dominions Land Settlement Corporation Ltd.* (1926) 1 Ch. 746.

(5) *Berry and Stewart v. Tottenham Hotspur Football and Athletic Co., Ltd.* (1935) 1 Ch. 718.

(6) *Rex v. London county Council, ex parte The Commercial Gas Co.* 11 T. L.R. 337.

(7) *Palmer v. Crone* 1927 1 K.B. 804.

(8) *Scammell and Nephew Ltd. v. Hurley* (1929) 1 K.B. 419.

(9) *Rex v. Port of London Authority* (1919) 1 K.B. 176.

**D. K. Walters** (**Wee Chong Jin** with him) for the applicant: Paragraph 12 (2) of the Food Control Proclamation (No. 10) confers a power on the Deputy Food Controller which must be exercised judicially. In considering whether to cancel a licence he is a competent authority acting upon consideration of facts and circumstances, whose decision affects the rights of the licence holder. His act, therefore, in cancelling a licence is a judicial act. See **Frome United Breweries Co. v. Bath Justices**(1). This principle has been applied to applications for licences. See **Reg v. London County Council, ex parte, Akkersdyk**(2).

It is not contended that the Deputy Food Controller in such a matter need act as though he were a court and it is conceded that in such a matter he may obtain information in any way he thinks best, but he must listen fairly to both sides, inasmuch as this is a duty which lays on any one who is to decide anything. In particular, he must give a fair opportunity to the licence holder to correct or contradict any relevant fact on which he (the Deputy Food Controller) proposes to act, prejudicial to the holder's view. See **Local Government Board v. Arlidge**(3). This the Deputy Food Controller, Johore, did not in this case attempt to do.

Apparently the Deputy Food Controller considers that as he may revoke a licence "without any reason assigned," this entitles him to deal with a judicial matter unjudicially. Those words have no such effect. The reason for exercising a power is a distinct thing from the grounds which give rise to its exercise. The said words have reference to the reasons which move the Deputy Food Controller in coming to such conclusion as he may see fit to reach and have no reference to the circumstances in which the power is exercisable. See **Duke of Sutherland v. British Dominions Land Settlement Corporation Ltd.**(4) and **Berry & Stewart v. Tottenham Hotspur Football & Athletic Co., Ltd.**(5); also **Palmer's Company Precedents, 15th edition (1938)** Part 1 at page 622.

If these contentions are right, a certiorari is appropriate. See **Halsbury** (2nd edition) volume 9, paragraph 1443 at page 852 and paragraph 1449 in particular at page 855. See also **Rex v. London County Council, ex parte The Commercial Gas Co.**(6).

It is submitted that the Indemnity & Validating Ordinance 1946, Section 3 (1) (a), does not protect the Deputy Food Controller. It is not suggested that at this stage there is any evidence of a want of bona fides, but the act done, to obtain protection, must be done "in the execution of his duty." This phrase is also used in the Justices Protection Act 1848, Section 1, and the cases on that Statute are applicable. The section protects an official for irregular acts within his jurisdiction, but it does not protect an official for acts which go beyond his jurisdiction, which is what were committed here. See **Halsbury's Statutes** Volume 13, page 450, and **Palmer v. Crone**(7).

The wording of the Public Authorities Protection Act 1893 may be compared. In that Statute occurs the phrase "execution or intended execution of his duty." If the words "intended execution" had been included in the local enactment, then the officer would have been protected if he bona fide thought he was acting within his jurisdiction, but those words were not included and cases under the Public Authorities Protection Act 1893 must be differentiated. See e.g. **Scammell & Nephew Ltd. v. Hurley**(8).

Moreover, in view of the power given by Section 3 (3) of the enactment to certify that an act was done in the execution of an officer's duty, it is clear that the sort of duty which is the subject matter of the protection is a duty which exists or does not exist as a matter of fact and those words would not be applicable to a common law duty to hear a matter judicially such as is in issue in this case and it is unthinkable that the certifying authority would ever have issued a certificate in connection with the sort of breach of duty alleged here against the Deputy Food Controller. This shows, therefore, that the enactment is not applicable in a case like this.

In any event, the protection of the Statute was waived by Captain Prichard when he rejected the applicant's application to re-open the matter and when he told him to go ahead with his application for a certiorari. See **Halsbury** volume 26, paragraph 630, page 304, which shows that the protection of such a Statute may be waived.

These proceedings are not civil proceedings and the court has jurisdiction. The applicant is merely taking the initiative in asking the court to exercise its very valuable jurisdiction for keeping subordinate tribunals within their jurisdiction. See **Rex v. Port of London Authority**(9). He is in the same position as a prosecutor in criminal proceedings which are brought in the name of the crown and if this matter proceeds to completion, it will become properly entitled **Rex v. Deputy Food Controller of Johore.** In England the matter would be heard in the Crown Paper and be governed by the Crown Office Rules. It is submitted, therefore, that the matter is not a civil one and that the court has jurisdiction.

**Laville, J.** — This is a motion asking for an order that Capt. F.P.G. Prichard, Asst. Food Controller, Johore, do show cause against the removal into this Court and the quashing of his order made on 20.5.46 that the licences of Chop Tay Chee Chuan to deal in flour and rice respectively be revoked as from 20.5.46.

The motion is made ex parte.

It is conceded that the Asst. Food Controller acted under sec. 12 (ii) of Proclamation No. 10 (Food Control), and that he had power to revoke the said licences without assigning his reasons for so doing. But it is deemed that he did so without affording Tay Ah Lian, the proprietor of the said Chop, any opportunity to meet any allegations or explain any facts which may have been the basis for the reasons which led the Asst. Food Controller to revoke the licences. It is deemed that the decision to revoke the licences was a judicial act, and that in arriving at that decision, the Asst. Food Controller was bound to act in accordance with the dictates of natural justice which compels him to give the person to be affected by any order to be made an opportunity for stating his case before the order is made. That while he is entitled by law to withhold his reasons for coming to the decision he did, he is not so entitled in regard to the grounds on which those reasons were based, and that therefore he acted outside his authority, and ex debito justitiae, his order should be quashed.

I may say here that the act of the Asst. Controller in ordering the licence to be revoked is a judicial act. This is well established law laid down in *Frome United Breweries Co. Ltd vs. Bath Justices*(1) and in *Local Govt. Board vs. Arlidge*(3) and other cases. It is also, in my view, well established that natural justice demands that an administrative officer acting judicially must hear both sides of a case and give the party to be affected by his order the opportunity of presenting his view of the facts. — *Halsbury* Vol. 26 Second Edition at p. 287 of para 606.

It appears from the correspondence filed with this motion that no such opportunity has been given to the applicant.

If these circumstances stood alone in the consideration of this motion, I would have no doubt that it was a proper occasion for the issue of a writ in the nature of a certiorari to show cause to be served on the Asst. Food Controller. But owing to the effect of the late war and the special legislation that has necessarily followed in its train, other considerations arise. The basis of the law to be administered in the Malayan Union is that laid down by the Malayan Order in Council 1946 of 27.3.46. This provides that H. E. the Governor may make laws with the advice of his Advisory Council till the proposed Legislative Council of the Union comes into being. In the interim, the Governor's laws and also the laws existing in each unit of the Union (subject to any modification made by the Governor's laws or the Order

in Council or other Orders in Council) are to be administered.

The Supreme Court of the Malayan Union empowers the Governor to appoint a day or different days on which the whole Ordinance or different parts of it or provisions of it are to come into force. By G.N. 11 of 1st April 1946, the whole Ordinance except the provisions relating to original Appellate and Civil jurisdiction of any Court was brought into operation.

On 23.5.46 G.N. 223 brought into force the civil jurisdiction of the Courts as far as suits, actions or other proceedings for the legal representation of the estate of deceased persons went.

The result is to-day that while the Court has complete Criminal jurisdiction, it has no authority or jurisdiction of any kind in civil matters, save in regard to suits, actions or other proceedings for the legal representation of deceased persons.

Counsel for the applicant Tay Ah Liang has argued that an application for a writ of certiorari is in the nature of a criminal application. I cannot accept this argument; in my view, it is in itself of a neutral nature and takes the colour of the proceeding in regard to which it is sought. This may be amply illustrated by *Halsbury* (vide Vol. IX Crown Practice Sec. 7 at p. 838 to p. 904 2nd Edition).

In my view, the decision by the Asst. Food Controller to revoke the licences was in its nature a civil one, affecting the civil rights of the applicant and it was clearly one in which no criminal responsibility could be attached to the applicant or criminal proceedings could have been taken, nor in my view, can it be said that refusal to give a hearing to applicant is a criminal wrong.

If my view as expressed above is correct, it is clear that this Court has not at this date any jurisdiction to entertain the application now made by Tay Ah Liang.

There is however another aspect of this matter to be considered. Under the provisions of the Malayan Union Order in Council, H. E. promulgated Ordinance No. 1 of 1946.

This Ordinance came into force on 1.4.46 and its object was to restrict the taking of legal proceedings in respect of certain acts done and payments made, and to validate, inter alia, orders of certain Courts and officers . . . made during the war period.

Section 2 of the Enactment defines the war period as commencing from 8th Dec. 1941 and continuing until such date as the Governor may by notification in the Gazette of the Malayan Union declare to be the end of the war period for the purposes of this Ordinance.

No such date has up to the present been notified in the Gazette by the Governor and the war period therefore continues to run.

Sec. 3 (i) (a) of the Ordinance lays down that no legal proceeding whatsoever shall lie or be instituted or maintained in any Court for, on account of, or in respect of any act or thing done during the war period, if done in good faith and in the execution of his duty for the purpose, inter alia, of maintaining supplies and services essential to the community, . . . . . by a person in the service of the B.M.A., or the Crown, or the public service . . . . . .

Legal proceeding is defined by sec. 2 of the Ordinance as including action, suit, prosecution, petition of right, application, cause, matter and every proceeding of whatever nature in any Court, whether criminal or civil.

Act is defined as covering also omissions.

It will be seen from the wording of the definition that every conceivable method of approaching the Court is covered by the definition in any aspect of jurisdiction, and that the wording excludes any working of the ejusdem generis rule which might tend to limit the meaning of the words.

It is also patent from the wording of section 3 that any act or omission such as the revoking of a licence or the failure to give a hearing to the person affected by such proposed revocation by an officer of the Food Control Department whose function is to maintain supplies and services falls within the protection of this section.

No allegation of malice or lack of good faith in the action of the Asst. Food Controller is made.

It is argued by counsel for the applicant that the protection of this section is similar to that given by the Public Authorities Protection Act, 1898, and the Justices Act, 1848; where the institution of an action, prosecution, or other proceeding is limited to a period of 6 months from the act complained of; that in such cases the limitation did not apply to writs of certiorari which could be sought out at any time and were not subject to limitation; there is good legal authority for the latter view.

It was also argued that the writ of certiorari is a high prerogative right of the Crown and is not affected by any limits of jurisdiction laid down by law.

I have come, after consideration, to the conclusion that the analogy made by counsel is not accurate. The Public Authorities Protection Act, while it limits for good reason the rights of action against judicial and other officers of the State does not entirely abrogate them. It allows action limited to a time which is fixed and ascertained by the date of the acts complained of, but such acts always have been and continue to be of such a nature that they can be called into question. The provisions of Ordinance 1 of 1946 as they now stand abrogate the right completely. There is no time during which actions done during the war period can be called into question, and when a date is fixed for the inclusion thereof, these actions become a body of actions against which there never has been and never will be a remedy, and so become sui generis. The wording of the definition of legal proceedings seems to me to be much stronger that those of the Act, and seems to me to have been meant to and to have actually precluded resource to any legal proceedings whatever. In my opinion, action by writ of certiorari is a legal proceeding and is, in view of sec. 2 and 3 of the Ordinance, not open to the applicant, nor can I hold that the inherent nature of proceedings by certiorari are superior to a direct prohibition laid down by a statute.

In my view, the applicant is still not left without a remedy· he may approach the Attorney-General under the provisions of sec. 3 (ii) of Ordinance 1 of 1946, either alleging bad faith on the part of the Asst. Food Controller and asking for an inquiry or permission to take proceedings, or he may petition the head of the Civil Administration for inquiry and remedy.

That there was need of the provisions of Ordinance 1 of 1946, as there always is, after the cessation of a war in which acts not strictly in accordance with the law are done for the public good, is extremely probable, but, in my view, the Govt. of the Malayan Union should consider whether the time is not now ripe to limit the protection given by sec. 3 of this Ordinance by fixing a date of expiry for the war period defined in sec. 2 of the Ordinance.

For the above reasons, namely, lack of jurisdiction by the Court and the absolute protection, as I conceive it to be, afforded by section 3 of Ordinance 1 of 1946 to the Asst. Food Controller, I must reject this application and make no order on the motion.

*Application Rejected.*

## P. P. v. LIM TEONG SENG AND 2 OTHERS.

**[Orig. Criminal Jurisdiction (Laville, J.) July 25, 1946]**

*F. M. S. Criminal Procedure Code S. 180 — Criminal trial before a Judge sitting alone — Submission of no case to meet.*

In this case the accused were charged with housebreaking before a Judge sitting alone. At the end of the case for the prosecution Counsel for the accused submitted that no case had been made out against the accused which if unrebutted would warrant a conviction and that therefore the Court was bound to record an order of acquittal. The learned Crown Counsel submitted that if there was any reasonable evidence offered by the prosecution the Court ought to hear the defence.

**Held,** (1) that the sections that cover procedure at the end of the prosecution evidence in the Magistrate's Court, in the Court of a Judge sitting alone and in the Court of a Judge sitting with assessors are substantially the same; and (2) that if at the close of the prosecution the Court was of opinion that on the evidence it could not, as a jury, hold the allegations proved beyond all reasonable doubt, there was nothing left for it to do but to acquit the accused.

*Case referred to —*

*P. P., Johore v. Fong Ah Tong and another* (1940) 9 M.L.J. 240.

**John Laycock** for accused No. 2 submitted :—

The language of S. 180 of the Criminal Procedure Code is word for word the same as the language of S. 190. The same construction must be given to both sections. In the case of the **Public Prosecutor Johore v. Fong Ah Tong and another**, 9 M.L.J. 240, the question at issue was the construction to be placed on S. 190 and the Court held that under that section the criterion at the close of the prosecution's evidence is, Has the prosecution proved its case beyond a reasonable doubt? If not, the accused should not be called on to enter on his defence.

This was a decision on S. 190 not on S. 180 but the language of both sections is identical and since the decision of this case, it has been followed on numerous occasions, and its ratio decidendi is applicable in the present case. Certainly in this present case it cannot possibly be said that the prosecution has proved its case beyond a reasonable doubt and therefore the 2nd accused is entitled to an acquittal.

**Braga** for accused Nos. 1 and 3 adopted Laycock's argument.

**Laville, J.** — Mr. Laycock at the close of the prosecution case submits that no case has been made out against his client which if unrebutted would warrant a conviction, and that therefore the Court is bound to record an order of acquittal.

Mr. Braga, on behalf of his clients Nos. 1 and 3 accused, makes the same submission.

The learned Crown Counsel submits that if there is any reasonable evidence offered by prosecution the Court ought to hear the defence.